IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

APPEAL FROM ORDER NO.606 OF 2001

1. Pratap Mahadeo Indulkar & ors. Appellants

vs.

1. Sumati Rajaram Indulkar & ors. Respondents

Mr.D.S.Sakhalkar with Ms.Tripti Rangnekar for the appellants.

Mr.M.K.Nesari for the respondents 1 to 9.

Mr.Y.S.Bhate for the respondents 10 to 14.

CORAM : B.H. MARLAPALLE,J.

DATED : 19th August 2005

P.C.

The impugned order was passed on 29th September 1998 and this appeal was filed belatedly. Delay was condoned by this Court's order dated 2nd July 2001 passed in Civil Application No.6362/2000. However, on 14th January 2003 it was pointed out to this Court that the Civil Application for condonation of delay was allowed without notice to all the respondents and, therefore, this Court directed to issue notice to all the respondents.

2. The delay was only of 65 days. The said application has been allowed today though the appeal was already

registered and in fact when the appeal came up for admission on 16th August 2005 it was made clear that the order of delay condonation would be restored and the learned counsel for the appellant sought time. Time was granted and on 17th August 2005 it was stated that Mr.Sakhalkar, the learned counsel for the appellant was indisposed and, therefore, the appeal from order was adjourned by way of last chance. When it is taken up for hearing today, the learned counsel for the appellants, at the first instance, stated that the appellants have settled with some of the defendants and negotiations would be held with some others. This statement has been denied by the learned counsel for the respondents.

3. The fact remains that an appeal challenging the order passed about 7 years back is still pending for admission and the learned counsel for the appellants renewed her prayer for adjournment. The prayer was turned down and she was called upon to argue the matter.
She stated that she is not ready.

4. I have considered the reasoning set out by the learned Judge of the City Civil Court in the impugned order dated 29th September 1998 by which the plaint was returned to the plaintiff for presentation to the proper court. If this order could have been followed in time,

probably the fresh suit could have been decided during the last about 7 years.

5. In the impugned order, the learned Judge of the City Civil Court noted that though the plaintiffs claim to have filed the suit for specific performance i.e. Suit No.668/1979, in fact the plaintiffs were seeking the recovery of possession of the suit premises. The plaintiffs contention that they had re-entered the suit premises was denied by the defendants and admittedly the suit premises were occupied by the tenants and the tenants have refused to pay the rent to either of the parties. The trial Court referred to the decision of the Supreme Court in the case of Jamnadas Dharamdas v. Dr.J.Joseph Farrei, **A.I.R. 1980 S.C. 1605** and in the case of Chandavarkar Sita Ratna Rao v. Ashalata S. Guram, **A.I.R. 1987 S.C.117** on the point of distinction from the statutory tenant and a contractual tenant. No distinction could be made between the statutory tenant and a contractual tenant and the statutory tenant was in the same position as a contractual tenant until the decree for eviction was passed against him.

6. The trial Court therefore recorded its finding that the tenancy being the main issue to be decided, it did not have the jurisdiction to try and entertain the suit unless the issue of tenancy of the original defendant

no.1 and his L.Rs was decided by the competent Court. The objections raised about the jurisdiction of the court on the ground of pecuniary powers was turned down.

7. Having considered the reasoning set out by the trial Court for returning the plaint for being presented before the proper court for deciding the question of tenancy, I am satisfied that no interference is called for in the said order as it cannot be termed as illegal or perverse.

8. The appeal is dismissed in limine.

(B.H. MARLAPALLE,J.)